

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

**THE AVENUE CARE AND
REHABILITATION CENTER**

and

CASE 08-CA-094941

**SEIU DISTRICT 1199, WV/KY/OH
THE HEALTHCARE AND
SOCIAL SERVICE WORKERS UNION**

**COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

Pursuant to Section 102.46(d) of the Rules and Regulations of the National Labor Relations Board (NLRB), the undersigned Counsel for the General Counsel respectfully files this Answering Brief to Respondent's Exceptions to Administrative Law Judge Mark Carissimi's Decision.¹

On August 12, 2013, a hearing concerning this matter was held before the Honorable Mark Carissimi. (ALJ).

On October 17, 2013, the ALJ issued his detailed and well-reasoned decision where he initially addressed and disposed of a procedural argument raised by Respondent. Thereafter, the ALJ concluded that Respondent committed several Section 8(a)(1) violations as alleged in

¹ In this Brief, Administrative Law Judge Mark Carissimi will be referred to as "ALJ"; The Avenue Care and Rehabilitation Center will be referred to as "The Avenue", "Respondent" or "Employer"; Service Employees International Union, District 1199, WV/KY/OH will be referred to as "Charging Party" or "Union". The ALJ's Decision in JD-74-13 will be identified with "ALJD" page and line; references to the official transcript of this proceeding will be referred to as Tr.____; Counsel for the General Counsel's exhibits will be referred to as GC Exh.____ and Respondent's exhibits will be referred to as R. Exh.____.

paragraphs 7, 8, 9 and 10 of the Complaint. The ALJ provided for a remedy, recommended Board Order and Notice to Employees to remedy these violations of the Act.

On November 14, 2013, Respondent filed Exceptions to the ALJ's Decision. This Answering Brief addresses Respondent's Pending Exceptions.

I. Respondent's Challenges to the Authority of the Board and the Acting General Counsel Have No Merit

In its post-hearing brief to the Administrative Law Judge and again in its exceptions, Respondent challenged the authority of Regional Director Calatrello to issue the complaint in this case. To this end, Respondent argued that the Regional Director could not issue the complaint because, first, the Board lacked a quorum, and, second, the Acting General Counsel was invalidly appointed. As explained below, Respondent is wrong on both fronts.

A. Regional Director Calatrello's appointment is valid

As an initial matter, regardless of the issue of the Board's composition, Acting General Counsel Lafe Solomon had independent authority to issue and prosecute complaints. *Bloomington's, Inc.*, 359 NLRB No. 113, slip op. at 1 (Apr. 30, 2013) ("[u]nder the NLRA, the General Counsel is an independent officer appointed by the President and confirmed by the Senate, and staff engaged in the investigation and prosecution of unfair labor practices are directly accountable to the General Counsel.") (citing 29 U.S.C. § 153(d); *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 127-28 (1987); *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010)). Thus, "[t]he authority of the General Counsel to investigate unfair labor practice charges and prosecute complaints derives not from any 'power delegated' by the Board, but rather directly from the language of the NLRA." *Id.* Accordingly, contrary to Respondent, both Acting General Counsel Solomon's authority to issue and prosecute the

complaint, and, in turn, Regional Director Calatrello's² to do so, are unaffected by any issue concerning the composition of the Board.

In any event, Respondent is confused about the timing in this case. In its exceptions, Respondent claimed that Regional Director Calatrello lacked authority to issue the complaint because the President's recess appointments to the Board were invalid, and, as a result, "the Board lacked the authority to appoint Calatrello as Regional Director in Region 8." (Exc., p. 1.) But, the Board appointed Mr. Calatrello to be Regional Director in October 1983—29 years before the President made the recess appointments currently at issue before the Supreme Court in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (Jun. 24, 2013).³ Thus, Respondent's claim that Regional Director Calatrello could not issue the complaint because his appointment is invalid is simply incorrect.

B. The Regional Director had authority to issue a complaint in this case because the Acting General Counsel was properly appointed

In *Hooks v. Kitsap Tenant Support Services, Inc.*, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013), *appeal docketed*, No. 13-35912 (9th Cir. Oct. 1, 2013), the judge concluded that under the Federal Vacancies Reform Act of 1998 ("FVRA"), 5 U.S.C. § 3345, et seq., Solomon could not serve as Acting General Counsel because he had not previously served as the first assistant to that office. That holding misinterprets the requirements of the FVRA. The FVRA designates three categories of persons who can serve in an acting capacity: (1) first assistants to the vacant office, (2) any Senate-confirmed officers in the government, and (3) other qualified high-level

² The General Counsel has delegated the authority to the Regional Directors for issuing complaints. See *United Elec. Contractors Ass'n v. Ordman*, 258 F.Supp. 758, 760 (D.C.N.Y. 1965), *aff'd*. 366 F.3d 776 (2d Cir. 1966).

³ Moreover, at the time it appointed Regional Director Calatrello, the Board had four members, all of whom had been confirmed by the Senate. See <http://www.nlr.gov/who-we-are/board/members-nlr-1935> (last visited Nov. 19, 2013).

officers or employees of the agency in which the vacancy arises. 5 U.S.C. § 3345(a)(1)-(3). Only individuals designated under the first category are required to have served as the first assistant to the vacant office. Indeed, the FVRA's legislative history makes clear that 5 U.S.C. § 3345(b)(1), which limits the circumstances in which first assistants may serve as acting officers, is inapplicable to persons designated pursuant to § 3345(a)(2)-(3). *See* 144 Cong. Rec. 27496 (1998) (Remarks of Mr. Thompson) ("Under § 3345(b)(1), the revised reference to § 3345(a)(1) means that this subsection applies only when the acting officer is the first assistant, and not when the acting officer is designated by the President pursuant to §§ 3345(a)(2) or 3345(a)(3).").

Here, because the President directed Solomon to perform the duties of the office of General Counsel pursuant to 5 U.S.C. § 3345(a)(3), there is no requirement that he previously have served as a first assistant. The legislative history of the FVRA clearly indicates that 5 U.S.C. § 3345(a)(3) was added to give the President the option of naming, as an alternative to a first assistant or Senate-confirmed official, "other qualified high-level agency employees to serve as acting officials." 144 Cong. Rec. 27439 (1998) (Remarks of Mr. Levin). The only requirements in the FVRA concerning this third category are that the person named must have served in the agency in which the vacancy arises for at least 90 days during the 365 days preceding the vacancy, and the person must have been paid at a rate at least equal to a GS-15. 5 U.S.C. § 3345(a)(3); *see also* 144 Cong. Rec. 27496 (1998) (Remarks of Mr. Thompson). Solomon meets these requirements. Accordingly, there is no legitimate basis for challenging his authority as Acting General Counsel.

On the basis of the above, Counsel for the General Counsel urges the Board to dismiss Respondent's Exception Number One.

II. RESPONSE TO RESPONDENT'S REMAINING EXCEPTIONS

In its remaining exceptions, Respondent has challenged some of the ALJ's credibility findings. As set out in *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F. 2d 362 (3d Cir. 1951), it is the Board's established policy not to overrule an ALJ's credibility resolutions unless the clear preponderance of all relevant evidence convinces the Board that the ALJ's credibility resolutions are incorrect. As will be demonstrated, this standard has not been met with respect to Respondent's remaining exceptions.

A. EXCEPTION NUMBER 2

Respondent, in Exception No. 2 maintains that the ALJ erred in crediting the testimony of current employee Tacquitia McGee (McGee) with regard to the Complaint paragraph 7, Section 8(a)(1) interrogation allegation. Specifically, Respondent asserts that the ALJ erred with regard to his conclusions at ALJD, Page 4, lines 39-46. Respondent, citing *Flexsteel Industries, Inc.* 316 NLRB 745 (1995), disingenuously suggests that the ALJ concluded that McGee's testimony with regard to the interrogation by Administrator Christopher Hope was truthful solely because she was a current employee. The record and the ALJ's stated credibility conclusions very clearly set forth his evaluation of McGee's demeanor, her detailed testimony and her consistency during direct and cross examination as considerations for his conclusion. Moreover, the ALJ appropriately relied upon Board law evaluating the reliability of the testimony by current employees which is adverse to the interest of their employer. For Respondent to boldly assert that the ALJ erroneously presumed that McGee's testimony was credible merely because she was a current employee simply misstates the testimony, the ALJ's detailed credibility evaluation and the Board law relied upon by the ALJ. To the contrary, the ALJ evaluated the credibility of the respective witnesses and correctly applied the Board's rationale in *Rossmore House*, 269 NLRB 1176-1178, (1984), *enfd.* 760 F.2d 1006 (9th Cir. 1985) and *Schneid Electric*, 355 NLRB No.

27, *slip op. at 1 (2010)*. Accordingly, with respect to Respondent's second exception, the standard articulated in *Standard Dry Wall Products, supra*. has not been met.

On this basis, Counsel for the General Counsel urges the Board to deny this exception and to affirm the ALJ's conclusion that Respondent violated Section 8(a)(1) of the Act on September 6, 2012 by interrogating McGee regarding whether she was soliciting employees to sign authorization cards. (ALJD, page 5, lines 23-25).

B. EXCEPTION NUMBER 3

In its third exception, Respondent challenges the ALJ's evaluation of McGee's testimony regarding the allegations articulated in Complaint paragraphs 8, 9 and 10 concerning Hope's interrogation of employees, promulgation of a rule prohibiting employees from discussing the Union and threatening employees with discipline if they violated this unlawful rule. Specifically, Respondent alleges that the ALJ erroneously concluded that McGee's testimony with regard to Hope's statements was consistent with her pre-trial affidavit. (ALJD, page 6, 37-38)

Respondent's attempt to employ McGee's pre-trial affidavit to impeach McGee was unsuccessful (ALJD, page 6, 35). In his decision, the ALJ referenced McGee's pre-trial affidavit which is consistent with her testimony regarding Complaint paragraphs 8, 9 and 10 concerning Hope's interrogation, promulgation of a rule barring discussions about the Union and threats to enforce this rule through discipline. (ALJD, page 6, lines 41-51 quoting portions of R. Exh. 1, page 9-10) Moreover, Respondent's reference in this exception to STNA in-service meetings has no connection to the allegations pertaining to Administrator Hope's conduct at issue in paragraphs 8, 9 and 10. Rather, the ALJ correctly credited McGee's testimony regarding Hope's statements and concluded Respondent violated Section 8(a)(1) of the Act as alleged in paragraphs 8, 9 and 10. (ALJD, page 7, lines 20-29, 31-33, Page 8, line 15-17)

As the standard for overruling an ALJ's credibility finding has not been met, Counsel for the General Counsel urges the Board to affirm the ALJ's detailed credibility analysis relative to the testimony of McGee, Pamela Glover and Christopher Hope regarding Hope's statements underlying Complaint paragraphs 8, 9 and 10.

On the basis of the ALJ's detailed credibility evaluation and appropriate application of Board law, Counsel for the General Counsel urges the Board to deny this exception and to affirm the ALJ's findings of fact and conclusions of law with regard to Complaint allegations of 8, 9 and 10. (ALJD page 7, lines 20-29, lines 31-44, Page 8, lines 15-17).

C. EXCEPTION NUMBER FOUR

Respondent asserts that the ALJ erroneously found that the testimony of Phindile Biyela was truthful and/or correct because Biyela was a current employee and therefore erroneously concluded that Respondent, through Assistant Director Annette Woodyard, violated Section 8(a)(1) of the Act in September or October, 2012 by interrogating employees about their union activity. (ALJD page 8, line 45-46). The record and the ALJ's detailed evaluation of the testimony of Biyela versus Woodyard demonstrate that while the ALJ noted Biyela's status as a current employee, he also considered her direct and forthright manner on the issue, her demeanor and her certainty. In comparison, the ALJ found Woodyard's testimony on this issue to be less detailed and less certain. Accordingly, applying his detailed credibility assessment and the standards set out in *Rossmore House*, 269 NLRB 1176 (1984) and *Scheid Electric*, 355 NLRB No. 27, slip.op at 1240, the ALJ appropriately concluded that Respondent, by Woodyard, in September or October, 2012 violated Section 8()(1) of the Act interrogating employees about their Union activities. With respect to Respondent's Exception Number 4, the standard

articulated in *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F. 2d 362 (3d Cir. 1951), has not been met.

On this basis, Counsel for the General Counsel urges the Board to deny this exception and affirm the ALJ's conclusion that Respondent, by Assistant Director Woodyard violated Section 8(a)(1) of the Act.

D. EXCEPTION NUMBER FIVE

In its final exception, Respondent alleges that the ALJ disregarded credible testimony by Administrator Hope that he understood that as of September 5, 2012, the Union was finished distributing authorization cards. (Tr. 117, lines 12-25, 118, line 1, 125, lines 4-21). In his evaluation of the allegation pertaining to Hope's September 6, 2012 interrogations of McGee, the ALJ closely examined Hope's testimony of this allegation. (ALJD, page 4, line 26-34, 48-50). In addition, the ALJ significantly pointed out that while Hope testified that Respondent witness Shameeka Craig was present during his conversation with McGee on September 6, 2012, Craig was not asked questions about this meeting. (ALJD, page 4, lines 36-37).

Respondent's reference to Hope's general testimony concerning the mechanics of any Union petition or authorization card solicitation (Tr. 117, lines 12-25, 118, line 1) are irrelevant to Hope's September 6, 2012 interrogation of McGee, particularly in light of the ALJ's detailed credibility evaluation.

As the standard for overruling the ALJ's credibility finding has not been met by Respondent in its final exception, Counsel for the General Counsel urges the Board to deny this exception and to affirm the ALJ's conclusion that Respondent violated Section 8(a)(1) of the Act

on September 6, 2012 by interrogating McGee regarding whether she was soliciting employees to sign authorization cards. (ALJD, page 5, lines 23-25).

III. **CONCLUSION**

Based on the foregoing, the ALJ's conclusions of law, his recommended remedy, the recommended Board Order and Notice to Employees should be affirmed and the Respondent's Exceptions should be denied in their entirety.

Dated at Cleveland, Ohio this 26th day of November, 2013.

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CERTIFICATE OF SERVICE

A copy of the foregoing Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision was sent to the following on this 26th day of November, 2013.

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